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No. 1128

IN THE

Supreme Court of the United States

OCTOBER TERM 1946

MORRIS HEFLER, GEORGE LEVY and AL LEVY,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

JACOB W. FRIEDMAN
Attorney for Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Morris Hefler, George Levy and Al Levy, respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered on February 13, 1947, affirming a judgment of the District Court of the United States for the Southern District of New York, entered in that Court on November 15, 1946, convicting the petitioners of the crime of receiving goods alleged to have been stolen in interstate commerce, in violation of 18 U. S. Code, Section 409.

Statement of Matters Involved

This is a criminal prosecution wherein two indictments were tried as one. The first charges (5; numerical references herein will indicate pages of the transcript of record) in substance that on June 8, 1946, petitioners Morris Hefler and George Levy received and had in their possession at 113 Prince Street, New York City, 28 cartons of jackets knowing the same to have been stolen, which goods were moving as, were part of and constituted an interstate shipment of freight stolen from a motor truck, said goods having been consigned by American Sheep Lined Coat Company, of New York City, to several points in other states. The other indictment (6) was found against petitioner Al Levy alone, and is identical in form with the first one, with the exception that it charges he "did buy and have in his possession" the same merchandise, instead of saying that he received and had it in his possession.

All of the petitioners were convicted after trial before United States District Judge Coxe. The jury, in rendering its verdict, recommended leniency as to petitioners Morris Hefler and George Levy (339), each of whom was sentenced to four months' imprisonment. Petitioner Al Levy was sentenced to fourteen months. Prior to imposition of sentence the District Court denied petitioners' motion for a new trial on the basis of newly discovered evidence and other grounds, and the denial of this motion was also presented for review.

On November 15, 1946, petitioners filed a notice of appeal. The appeal was prosecuted with unusual diligence and argued on December 12, 1946 (493). It was not decided, however, until February 13, 1947, when the judgment was affirmed, the Circuit Court of Appeals rendering an opinion by Swan, Circ. J. (493-498).

Questions Presented

The questions involved and the grounds of appeal are briefly as follows:

1. The proof of petitioners' innocence was so clear, and the evidence of guilt of such slight, remote or conjectural significance, that the issue should never have been submitted to the jury, and their motion for a directed verdict of acquittal should have been granted.

2. The Government failed completely to establish that there was an original theft from any of the specified places as required by the language of the statute under which the prosecution was brought. The absence of such proof necessitates a reversal.

3. The terms of the stipulation, whereby it was agreed that the merchandise was stolen from the consignor, establish that there never actually was a delivery to the carrier or a passage of title to the respective consignees, and that consequently there never was any movement in interstate commerce such as to give jurisdiction to the Federal court.

4. The showing of newly discovered and additional evidence was such as to entitle petitioners to a new trial, and the denial of their motion by the District Court was an abuse of discretion.

5. The refusal of the District Court to issue a writ of habeas corpus ad testificandum to establish a jurisdictional defect in aid of petitioners' motion for a new trial was reversible error.

6. The reception, over objection, of evidence tending, without any justification whatsoever, to suggest the commission of other crimes by petitioners, was clear, prejudicial and reversible error.

7. On the issue of whether petitioners purchased the merchandise at a reasonable price, it was reversible error to admit despite objections (a) evidence of a high retail price of the goods involved; (b) testimony of a bookkeeper as to selling prices; and (c) evidence of the OPA ceiling prices of a particular firm.

Reasons for Allowance of Writ

The reasons petitioners urge for the allowance of certiorari herein are substantially the same as the propositions outlined as constituting the questions presented above.

In addition to these several propositions, petitioners urge that the holdings of the District Court of the Circuit Court of Appeals below extending the scope of the statute under which the prosecution was brought to a case wherein no proof is adduced of the place from which the property was stolen, is an unsound and unwarranted application of that law. Moreover, the decisions sought to be reviewed raise an important question of federal law which has not been, but should be, settled by this Court. In addition, the decisions below, on all the points urged, are probably in conflict with applicable decisions of this Court. Finally, the holding sought to be reviewed to the effect that petitioners were not prejudiced by the improper evidence received, so far sanctions a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Apart from and in conjunction with the points of law about to be developed in the subjoined brief, petitioners reiterate, as they have done in every tribunal heretofore having occasion to consider this case, that they are completely innocent of the offense charged. Three business men, ranging in age from 50 to 62, all respected and reputable, all with families, all leading blameless lives, none with any previous encounter with the criminal law, have been thrown into prison, the victims of a shocking miscarriage of justice. They participated in a routine transaction in an utterly routine fashion. They bought a quantity of merchandise from an individual under circumstances indicating nothing unusual. They paid a fair price for it and paid by check. They obtained an invoice. They offered the goods for resale in the most open and artless manner. They assisted the authorities in bringing the true culprits to justice, and did so zealously and effectively, upon the first intimation that the goods were stolen. They sued for and recovered the purchase price they had paid. Their conduct throughout has been that of any decent, honest, respectable individual. And simply because one Kaufman, an accomplice of the thief, in a palpable attempt to win leniency for himself, came forward with the fantastic story that he apprised petitioners that the goods were not being sold by him as "a legitimate transaction" (31)—an accusation whose utter falsity is proclaimed by all the attendant circumstances—, petitioners are now being made to suffer the penalties of a cruelly unjust conviction.

Petitioners persistently stress the factor of innocence, and earnestly ask this Court to consider it as giving added weight and cogency to every argument hereinafter advanced. Their points are such as they believe to be properly available to every aggrieved appellant, but most cer-

tainly and forcefully so to a person who, although guiltless, has been adjudged otherwise. This is no mere argument of weight of evidence. "There exists in this court, however, especially in cases where life and liberty are involved, an inherent power to consider the sufficiency of the evidence to sustain a verdict of guilty." *Edwards* v. *U. S.*, 7 F. 2d 357. To that indisputably right and humane doctrine petitioners add the proposition, equally sound and well established, that in a close case—the most charitable view to be taken of the Government's proof—especially sedulous care must be exercised to discover whether any important right of petitioners has been denied or prejudiced, for under these circumstances an error that might elsewhere be condoned or disregarded could easily have sufficed to turn the scales of the verdict against them. "Finally, if the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal." *Ah Fook Chang* v. *U. S.*, 91 F. 2d 805.

Petitioners are loath to believe that innocence of a criminal charge, notwithstanding conviction and affirmance by an intermediate Appellate Court, should be an impediment to the exercise by the highest Court of its jurisdiction to review, and they steadfastly maintain that any doubts as to the entertainment of the appeal should be resolved in their favor in a case where their persistence in seeking vindication springs from their innocence.

WHEREFORE, your petitioners pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the

end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that the petitioners may be granted such other and further relief as may seem proper.

Dated: New York, N. Y., March 13, 1947.

MORRIS HEFLER, GEORGE LEVY and AL LEVY,
Petitioners.

By JACOB W. FRIEDMAN,
Counsel for Petitioners.

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BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit has not yet been officially reported. It is annexed to the certified transcript of the record heretofore filed herein, and is reprinted an an appendix hereto.

No opinion was rendered by the United States District Court for the Southern District of New York.

Jurisdiction

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on February 13, 1947. The jurisdiction of the Supreme Court of the United States is invoked under Section 240 (a) of the Judicial Code, as amended, also known as 28 U. S. Code, Section 347.

Statute Involved

United States Code, Title 18, Sec. 409, provides as follows:

> "LARCENY, ETC., OF GOODS IN INTERSTATE OR FOREIGN COMMERCE; PENALTY.—Whoever shall unlawfully break the seal of any railroad car containing interstate or foreign shipments of freight or express, or shall enter any such car with intent in either case to commit larceny therein; or whoever shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, wagon, automobile, truck, or other vehicles, or from any steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen; or whoever shall steal or shall unlawfully take, carry away, or by fraud or deception obtain with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation from one State or Territory or the District of Columbia to another State or Territory or the District of Columbia or to a foreign country, or from a foreign country to any State or Territory or the District of Columbia, or shall break into, steal, take, carry away, or conceal any of the contents of such baggage, or shall buy, receive, or have in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been stolen, or whoever shall steal or shall unlawfully take by any fraudu-

lent device, scheme, or game, from any passenger car, sleeping car, or dining car, or from any passenger or from the possession of any passenger while on or in such passenger car, sleeping car, or dining car, when such car is a part of a train moving from one State or Territory or the District of Columbia to another State or Territory or the District of Columbia or to a foreign country, or from a foreign country to any State or Territory or the District of Columbia, any money, baggage, goods or chattels, or who shall buy, receive, or have in his possession any such money, baggage, goods, or chattels, knowing the same to have been stolen, shall in each case be fined not more than $5,000, or imprisoned not more than ten years, or both, and prosecutions therefor may be instituted in any district wherein the crime shall have been committed or in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels. The carrying or transporting of any such freight, express, baggage, goods, or chattels from one State or Territory or the District of Columbia into another State or Territory or the District of Columbia, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties above described for unlawful taking, and prosecutions therefor may be instituted in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which they shall have been brought by such offender. The words 'station house,' 'platform,' 'depot,' 'wagon,' 'automobile,' 'truck,' 'or other vehicle,' as used in this section shall include any station house, platform, depot, wagon, automobile, truck, or other vehicle of any person, firm, association, or corporation having in his or its custody,

therein or thereon, any freight, express, goods, chattels, shipments, or baggage moving as or which are a part of or which constitute an interstate or foreign shipment." (Feb. 13, 1913, c. 50, Sec. 1, 37 Stat. 670; Jan. 28, 1925, c. 102, 43 Stat. 793; Jan. 21, 1933, c. 16, 47 Stat. 773.)

Statement of the Case

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

Specification of Errors To Be Urged

It is intended to urge the following errors:

1. The proof of petitioners' innocence was so clear, and the evidence of guilt of such slight, remote or conjectural significance, that the issue should never have been submitted to the jury, and their motion for a directed verdict of acquittal should have been granted.

2. The Government failed completely to establish that there was an original theft from any of the specified places as required by the language of the statute under which the prosecution was brought. The absence of such proof necessitates a reversal.

3. The terms of the stipulation, whereby it was agreed that the merchandise was stolen from the consignor, establish that there never actually was a delivery to the carrier or a passage of title to the respective consignees, and that consequently there never was any movement in interstate commerce such as to give jurisdiction to the Federal court.

4. The showing of newly discovered and additional evidence was such as to entitle petitioners to a new trial, and the denial of their motion by the District Court was an abuse of discretion.

5. The refusal of the District Court to issue a writ of habeas corpus ad testificandum to establish a jurisdictional defect in aid of petitioners' motion for a new trial was reversible error.

6. The reception, over objection, of evidence tending, without any justification whatsoever, to suggest the commission of other crimes by petitioners, was clear, prejudicial and reversible error.

7. On the issue of whether petitioners purchased the merchandise at a reasonable price, it was reversible error to admit despite objections (a) evidence of a high retail price of the goods involved; (b) testimony of a bookkeeper as to selling prices; and (c) evidence of the OPA ceiling prices of a particular firm.

ARGUMENT

1

The proof of petitioners' innocence was so clear, and the evidence of guilt of such slight, remote or conjectural significance, that the issue should never have been submitted to the jury, and their motion for dismissal of the indictment and a directed verdict of acquittal should have been granted.

We begin with the proposition that the "scintilla" rule is not followed by the federal courts; that the record will be freely examined with a view towards ascertaining whether the conviction is supported by substantial evidence; and that where the proof is so weak, meager and unsatisfactory as not to rise to the level of "substantial evidence," a conviction should be reversed. Moreover, where all the substantial evidence is as consistent with innocence as with guilt, the judgment will not be permitted to stand. *Nosowitz* v. *U. S.* (C. C. A. N. Y.), 282 F. 575; *Paul* v. *U. S.* (C. C. A. Pa.), 79 F. 2d 561; *Williams* v. *U. S.* (App. D. C.), 140 F. 2d 351.

The theory of prosecution was that one Sullivan, a truckman, stole the merchandise from the consignor, sold it to one Fisher, who in turn sold it to one Kaufman; and that Kaufman sold it to petitioners. It was not contended by the Government that petitioners had any dealings at all with Sullivan or Fisher, or even knew either of them.

Sullivan did not testify. It was stipulated that he was a truck driver for Scott Bros., Inc., contract drivers for the Pennsylvania Railroad; that on June 7, 1945, he stole

1400 leather jackets while in process of shipment from New York City to points outside of the state; and that he sold them to Fisher. The significance of the stipulation will be hereinafter discussed. It was also stipulated that Sullivan stole the coats "from the consignor," the American Sheep Lined Coat Company, of 890 Broadway, New York City (7-9).

Fisher, a wholesaler and jobber of general merchandise, had had previous dealings with Sullivan (17). On June 7th he purchased the jackets from Sullivan, knowing they were stolen (17) and paying him, according to Fisher's testimony, $2.45 per jacket (22). He did not know where they had been stolen (24). He made payment the following day, when he promptly sold the jackets to Kaufman, the latter paying Fisher $2.65 per jacket in cash (21). While the goods were in Fisher's possession he did his best to obliterate any markings on the outside of every carton, so that no one thereafter inspecting could see either that the cartons came from the American Sheep Lined Coat Company or that they were to go via Pennsylvania Railroad to destinations outside of the state (23).

We now come to the testimony of Al Kaufman, the only witness whose testimony could by any construction be viewed as implicating petitioner. He had been a textile jobber for three years prior to June, 1945 (28). He said that he had met petitioner Al Levy in the early part of 1945, in Al Levy's office, in the presence of a Mr. Jet Mandel, whom Kaufman had known for about two years before that. In fact, Mr. Mandel had taken Kaufman to Al Levy's office for the purpose of introducing him (28-29). As a result of this meeting, Kaufman testified, he sold Al Levy three or four dozen children's coats, giving him a bill and receiving payment by check (29-30). These,

of course, were no part of the jackets involved in the indictments. It was later conclusively proved by documentary evidence in the form of a check (Def. Ex. A, 352) and an invoice (Def. Ex. G Id., 354) that this transaction actually took place on July 25th, 1945; petitioner Al Levy was thus effectively substantiated in his testimony that he never met Kaufman before June 8th, 1945; likewise Kaufman was completely discredited in his brazen attempt to establish prior dealings with Al Levy.

Kaufman further testified that he was in the habit of carrying a business card bearing his name and that he gave one to Al Levy (29-30).

On June 8th, 1945, according to Kaufman, he went to petitioner Al Levy's office with Mr. Mandel, and showed him a sample of a leather jacket, of which he offered to sell him 1400 at $4.25 each. They finally agreed on a figure of $4.00. Kaufman testified that he told Al Levy, "I have to sell it all cash, as it isn't a legitimate transaction" (31). Al Levy thereupon said, Kaufman testified (31), "I will call my brother downtown and I will have you send it to his place and I will come down and check it off and pay you." Al Levy explained that he had no room in his office uptown (32) and telephoned his brother. Kaufman then procured a truckman to go over to Fisher's place to pick up the cartons, gave the truckman the address of Hefler & Levy (the other two petitioners) and followed in a taxicab (32). He went to their place of business, meeting them there for the first time (33). They helped to unload the merchandise (33-34). Petitioner George Levy telephoned his brother (petitioner Al Levy), who arrived at the premises later (34-35). Petitioner Al Levy counted and examined some of the cartons and instructed his brother to give Kaufman a check, saying he (Al Levy) would reimburse him (35). Al Levy asked

for a bill, whereupon Kaufman answered that he could not give one (as he testified), "as it isn't a legitimate transaction" (35). He then agreed to give a bill but would not put his own name on it (35-36). He actually gave two bills dated June 7th, in the name of Sam Bronson, of 143 West 37th Street, New York City, which name and address, according to his testimony, were fictitious (37). There were two different kinds of jackets in the shipment of 1400 (37). Petitioner George Levy gave him two checks in amounts corresponding to the bills (37), which were made out to Hefler & Levy (38). Kaufman endorsed the checks "Sam Bronson," and cashed them at a check cashing agency (40). Later, when questioned by the F. B. I. in connection with the transaction, Kaufman continued to insist that Sam Bronson was a real person, until about February, 1946, upon learning that Fisher was about to be apprehended, he confessed (42). It is noteworthy that when the stolen character of the goods was established, petitioners Hefler and George Levy proceeded to sue Kaufman to recover the purchase price of $5,600, attaching his bank account in the process to the extent of $7,000, whereupon Kaufman stipulated in writing to permit them to withdraw and obtain a refund of the amount due them (43). The conduct of petitioners in insisting upon a refund in view of the breach of warranty of title is obviously that of decent, respectable men. Moreover, if the transaction had been at all as Kaufman later sought to contend, to wit, that petitioners had knowingly purchased stolen merchandise, then the parties would clearly have been *in pari delicto* and no action to recover the price paid would have been maintainable. Kaufman was acting under the advice of counsel (43), and his prompt settlement constitutes an eloquent recognition by him of the complete innocence of petitioners' position.

We have taken the liberty of detailing the testimony of Kaufman at some length since it is actually, whatever its value, the beginning and the end of the case against petitioners. It will be recalled that in the attempt to impute to them knowledge that the goods were stolen, Kaufman did not employ any such words in his alleged conversations, or even words of similar import. He limited himself to the alleged disclosure to petitioners that *the transaction was not legitimate.* Far from mentioning any larceny, he did not even characterize the goods, but confined himself to two alleged disclosures that the transaction was not legitimate (31, 35). The term "legitimate," even when employed in a statute, is given no narrow or technical sense but is held to be the equivalent of "good" or "proper" (*People* v. *State Racing Commission,* 57 Misc. 331, 103 N. Y. S. 955). Certainly in the parlance of a man like Kaufman, and particularly in view of the necessary presumptions inherent in a criminal prosecution, we must not ascribe to it the meaning "involving stolen goods." Indeed, we are bound to interpret it otherwise. Thus, if a transaction is described as not being legitimate, it may very well mean that the goods are the property of an insolvent merchant; or that they are being sold at a price other than that fixed by law; or that the sale is made in violation of an O. P. A. regulation or allotment; or that the deal may be irregular for any one of a number of reasons that readily suggest themselves. Should it be said that some taint or obloquy may attach to any such sale, we must constantly bear in mind that petitioners were not charged with any other hypothetical offense but with receiving stolen goods knowing them to have been stolen.

On cross-examination, when Kaufman was pressed with the language he had used (50, 57), he sought to

qualify or remedy it by indicating that he said or meant that he had communicated the fact of the goods having been stolen. His most explicit word on the subject was (50):

> "I can't recall word for word but I distinctly remember telling the man the goods were not legitimate; they were stolen goods."

The Court will note the semicolon, whose possible effect is to exclude the ensuing clause from the alleged communication and to limit the characterization to the present assertion of the witness, namely, the goods were in fact stolen goods (although that circumstance was not necessarily brought home to petitioner Al Levy with whom he was supposed to have had this conversation). Where Kaufman elsewhere on cross-examination stated that he conveyed to petitioners the impression that the goods were stolen (e.g., 57), the word "stolen" occurs in the questions, the answers merely assenting.

We ask whether in this equivocal and unsatisfactory condition of the record—and it must be remembered that this is the only proof of alleged guilty knowledge—it can fairly be said that the Government adduced substantial evidence on this most crucial feature of the case. The consideration accorded to the facts by the Circuit Court of Appeals was extremely superficial.

We do not propose to review in detail the testimony of petitioners themselves or that of Jet Mandel. Consistently they testified as to the complete innocence of the transaction so far as they were concerned; that it was a purchase conducted openly and in the regular course of business; that they had no intimation of any theft or other irregularity; that they paid by check as they would

have paid for any other goods; that Kaufman had stated the contractor was out of regular invoices and one would be supplied as soon as they came from the printer in a few days, so that they would have to be content with written invoices in the interim (266); and that they offered the goods for resale in New York City in the most open and aboveboard manner, being corroborated on this score by one Wagner, a salesman, who offered the jackets for sale to various local merchants on behalf of Hefler & Levy (191-194). We have already adverted to their successful suit to recover the purchase price.

Not the least significant aspect of the case is the full and fair manner in which petitioners cooperated with the police and the federal authorities in causing the arrest of Sullivan, Fisher and Kaufman, the true culprits. When Kaufman learned that the police had become aware that these particular goods were stolen, he left town; petitioners attached his bank account; Fisher was still in hiding; when Kaufman returned he pretended to be assisting Detective Rosenfeld in the effort to locate "Bronson," although, of course, he knew there was no such person (115). But petitioners Hefler and George Levy at the time of the delivery of the merchandise to them had noted the number of the truck, and voluntarily gave that information to Detective Rosenfeld (117-118); this led to the discovery of Fisher, and Kaufman refunded the purchase price in the lawsuit. Petitioners had been selling the goods on open account, and there was not the slightest element of furtiveness in their actions. At every point their conduct was that of innocent men, as indeed they are.

The very least that can be said for petitioners on the factual phase—and we have not even mentioned the character witnesses and the attendant circumstances of their

backgrounds and businesses, all of which attest their reputability—is that they were convicted on evidence of the most tenuous and scanty sort. If by any construction it can be deemed to measure up to the law's minimum requirements, the Court most assuredly should scrutinize the proceedings to determine whether they were tried with every legal safeguard, a slight deviation from which could well have affected the outcome.

2

The Government failed completely to establish that there was an original theft from any of the specified places as required by the language of the statute under which the prosecution was brought. The absence of such proof necessitates a reversal.

A careful reading of the statute (Section 409 of 18 U. S. Code) discloses that, whether a person is being prosecuted for the larceny or (as herein) for receiving, an indispensable characteristic of the basic theft, *inter alia,* is that he must have stolen the goods from a railroad car, station house, platform, depot, wagon, automobile, truck, other vehicle, steamboat, vessel or wharf. If the goods were not stolen from one of these places or objects, the theft does not come within the purview of the law. Likewise, to be criminally chargeable with receiving, the receiver must buy or take into his possession "such goods or chattels." This means that the goods received must also have been misappropriated from one of the specified places or objects.

Since in the instant case it was stipulated that the goods were stolen from the consignor, and inasmuch as it was never shown, suggested or stipulated that the pos-

session of the consignor extended to the goods while they were in any of the prescribed places or objects, the commission of a crime denounced by the statute was not established.

The importance of the place of theft in the statutory scheme is fixed by various adjudicated cases. To begin with, in *U. S.* v. *Moynihan*, 258 F. 529, the indictment charged a theft from a platform or depot. In reversing the conviction, the Third Circuit Court of Appeals wrote by Buffington, Circ. J.:

> "On another phase of the case, however, we think that the proof has failed to establish, with the degree of certainty required in criminal cases, one of the jurisdictional prerequisites of the statute and necessary allegations of the indictment. It will be observed from the above-quoted provision of the statute that, so far as goods constituting an interstate or foreign shipment of freight or express are concerned, it is limited in its application to thefts from certain designated places. In obedience to this requirement, the indictment alleged that the bale of silk in question had been stolen from a platform or depot of the 26th Street terminal of the American Express Company in New York City. That the proofs were insufficient to warrant the jury in finding that this allegation of the indictment had been substantiated was properly raised on the close of the testimony by motion for a direction of verdict of acquittal, and error assigned on the refusal of the trial court to grant the motion.
>
> "* * * The jury were permitted, therefore, merely to guess as to whether one of the essential elements necessary to justify a conviction had been established, without substantial evidence upon which to base an affirmative answer."

Similarly, in *U. S. v. Cohen*, 274 F. 596, the same Court, reversing a conviction for larceny of goods moving in interstate commerce, held:

> "This is not a statute against the larceny of personal property generally, but against the larceny of a special class of property from particular places. The property must be 'an interstate or foreign shipment of freight or express,' and must be stolen from a 'railroad car, station house, platform, depot, steamboat, vessel, or wharf.' The case of goods was concededly interstate in character. To sustain the conviction, however, it was necessary that the indictment, charge and the evidence established that the case was stolen from some one of the particular places mentioned in the statute. U. S. v. Moynihan, 258 F. 529. The indictment does not charge where the case was stolen. All that it says on this subject is that the defendant, when he had these 'goods and chattels in his possession, knew the same to have been stolen.' They were 'picked up' by a driver of the express company at the Bush Terminal building, Brooklyn, New York and, so far as the record shows, it is not known when and where the change of address on the case was made. The evidence is sadly silent from the time of the delivery of the case at the Bush Terminal building until it appeared some days later on the platform of the express company in Jersey City. Consequently the crime was neither charged nor proved."

That the same rule applies to an indictment for receiving appears from the holding in *Wolkoff* v. *U. S.*, 84 F.

2d 17, where Allen, Circ. J., wrote for the Sixth Circuit Court of Appeals:

> "Here the court had jurisdiction, but the first indictment was invalid. It failed to designate the place or vehicle from which the goods were stolen. Under Title 18, Section 409, U. S. C. A., this averment is a jurisdictional prerequisite. The faulty indictment in its material portions alleged that appellant received stolen goods, 'knowing that same had been stolen from the Interstate Motor Freight Company, Detroit, Michigan, while in the course of transportation in interstate commerce from the Standard Manufacturing Company, Indianapolis, Indiana, to The Great Atlantic & Pacific Tea Company, Cleveland, Ohio.' The statute expressly covers the stealing of goods from certain designated places, and the indictment must aver specifically the place from which the goods were stolen."

In short, once it appears that the theft was from the consignor herein and that the consignor's possession of the goods failed to embrace any of the statutory localities, a jurisdictional element of the proof is lacking and the conviction cannot be sustained.

The charge (330) was silent on the question of the place from which the goods were stolen. It is quite evident that this essential element of the crime, as defined by the statute, was overlooked by all concerned—the trial Court, the prosecution and the defense. The stipulation contains not a syllable on this feature of the case. Under the *Moynihan* case, cited above (258 F. 529), "that the proofs were insufficient to warrant the jury in finding that this allegation of the indictment had been substantiated

was properly raised on the close of the testimony by motion for a direction of verdict of acquittal" (326).

To urge, as the Government apparently does, that the stipulation to which we have referred was intended to cover the question of place, is absurd. The stipulation is not to be extended beyond its exact language, and any attempt to read into it by implication something which it utterly fails to mention is altogether improper. We may as well say that petitioners intended to stipulate that they had knowledge of the stolen character of the goods. Nor is our argument as to the complete unavailability of the stipulation to supply the missing proof, to be disposed of by any characterization of "pettifogging." The best indication that the contention is substantial is supplied by the surrounding circumstances, from which we firmly believe that the goods were not in fact stolen from any of the vehicles or places which the law prescribes as indispensable to the prosecution. They were admittedly stolen from the consignor and there is nothing whatever to show that the consignor ever had them in any such place. As for the Government's suggestion, made on the argument in the Circuit Court of Appeals, that the consignor might well have shipped the goods to himself at other points, this is sheer nonsense, for the indictments herein plainly state the names of the several consignees (5, 6). Are these petitioners to be penalized by conviction and incarceration for acts which, on any view of the case, were not and could not be federal offenses simply because on the trial every one concerned overlooked a vital omission? Or is it not absolutely in accord with law to impute to their motion to dismiss a scope adequate to reach so basic a deficiency? This is surely plain error, more than adequate to necessitate a reversal.

The Circuit Court of Appeals advances two answers to this argument, and we submit that both of them are totally inadequate. Firstly, the Court says that "the theft necessarily occurred after they (the goods) were loaded on the truck driven by Sullivan, for only then did they get into the stream of commerce." The fallacy of this suggestion lies in the very evident circumstance that it fails to take account of the real and substantial possibility that the goods were stolen by Sullivan either at the instant of his taking possession of them from the premises of the consignor or at a point intermediate between his taking such possession and their being loaded on the truck. Certainly in the second of these cases, that is, the formulation by Sullivan of an intent to steal while the cartons were on the sidewalk outside of the premises of the consignor and not yet loaded on the truck, would have been wholly consistent with all of the evidence and yet would not have furnished a set of facts within the highly precise ambit of the statute. Secondly, the Circuit Court of Appeals professed to find confirmation that the goods were stolen while on the truck by Fisher's testimony that the cartons were transferred to his premises from Sullivan's truck (496). This is a most inexact and untenable view of the subject. There is nothing in the statute rendering it criminal to transfer certain stolen goods from a truck, nor is the fact that the goods were at some time on a truck a substitute for the Congressional mandate that the goods be stolen from a truck. The argument of the Circuit Court of Appeals might be significant if Fisher were being charged with the theft, but the difficulty with this position is that the theory of prosecution was a theft by Sullivan. This is set forth in the stipulation (7-10), and constitutes the one basic fact concerning which there is no dispute whatsoever. Accordingly, for the learned Court below to descry

in the presence of the goods on a truck at one point of time a compliance with the statutory requirement that the truck be the *locus e quo* of the theft, is utterly unsound reasoning and no foundation upon which the commission of crime can be predicated.

3

The terms of the stipulation, whereby it was agreed that the merchandise was stolen from the consignor, establish that there never actually was a delivery to the carrier or a passage of title to the respective consignees, and that consequently there never was any movement in interstate commerce such as to give jurisdiction to the Federal Court.

A careful study of the stipulation which was intended to establish the jurisdictional fact of a theft of goods while in interstate commerce, discloses that it establishes the exact contrary. The most important part of the stipulation was its conclusion, namely, that the goods were stolen "from the consignor" (9)—which words were omitted when the prosecutor purported to read the stipulation on the argument in the Circuit Court of Appeals.

Our position is grounded on the basic principle that when goods are sold to a person at a distance from the seller and then are entrusted to a common carrier for delivery to the buyer, in the absence of an explicit understanding or evident intention to a different effect, the title is deemed to vest in the buyer at the moment of delivery to the carrier. The rule on delivery to a carrier as vesting title in the purchaser was recognized more than a century ago in *The Mary and Susan,* 1 Wheat. 25, 4 L. Ed. 27, where this Court, in an opinion by Chief Justice Mar-

shall, held that title to property under such circumstances vested in the purchaser upon delivery to the carrier. There is no need to adduce numerous authorities in support of a proposition so firmly grounded in the law. We may note that the doctrine has been adopted by the Uniform Sales Act and is contained in New York Personal Property Law, Section 100, Rule 4, Subd. 2, reading as follows:

> "Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section one hundred and one. This presumption is applicable, although by the terms of the contract the buyer is to pay the price before receiving delivery of the goods, 'collect on delivery' or their equivalents."

The exceptions referred to have no pertinency herein. The rule prescribed by the statute is declaratory of the common law. See *Standard Casing Company* v. *California Casing Company,* 233 N. Y. 413.

More specifically, New York Personal Property Law, Section 127, Subd. 1, reads as follows:

> "Where in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section one hundred, rule five, or unless a contrary intent appears."

With reference to this statute, Cardozo, J., wrote, for the Court of Appeals, in *Miller* v. *Harvey*, 221 N. Y. 54:

> "The general rule is that delivery to a carrier is delivery to the buyer * * *.
>
> "The statute is declaratory of the rule at common law."

Indeed, the rule was recently declared in *Madeirence* v. *Lumber Company*, 147 F. 2d 399, certiorari denied, 325 U. S. 861, 89 L. Ed. 1982.

It follows correlatively that in a transaction of this type, whereby title passes to the buyer simultaneously with delivery to the carrier, title must be deemed, in the absence of express agreement to the contrary, to remain in the seller until there is a delivery to the carrier. In the present case no such special agreement was shown and therefore the sale must be viewed as being subject to the general rule of law. We find, accordingly, that the goods were stolen from the consignor. This fact was established by stipulation, from which it is a reasonable and necessary inference that the truckman Sullivan obtained possession of them *animo furandi*. The consignor may well have entrusted them to Sullivan with a different intent (in the mind of the consignor), but Sullivan never shared in or conformed to that intent. At the very moment the goods came into his custody, *eo instanti* he misappropriated them with the intent to steal. Accordingly, there never was the slightest movement in interstate commerce. There is a recognized line of demarcation defining the point at which the interstate trip is considered to begin. That line is the one dividing the custody of the consignor and the custody of the carrier or any instrumentality of the carrier imparting to the goods an onward motion in the direction of their destination.

A recent occasion when the Court below was required to specify that line was *U. S.* v. *Fox,* 127 F. 2d 237. There a New York merchant placed silk in cartons for shipment to California. His servant made out a through bill of lading and a "shipping order," and delivered both together with the cartons to the servant of a truckman. The truckman's servant picked them up in a hand-car and took them to the truckman's place of business. There two other servants of the truckman put them on a motor truck, and together with the documents, drove to the freight yard of the Erie Railroad. One of the men on the truck took the bill of lading to the receiving clerk of the railroad, who signed and returned it. Upon this man's return to the truck he agreed with his fellow to withhold one carton, and later the two of them delivered it to the defendant under circumstances charging defendant with knowledge that it had been stolen. This was held to have become part of an interstate shipment, the opinion reading (per curiam):

> "Although we have therefore not been able to find any authority precisely on all fours, we are satisfied that at least as soon as the goods have finally left the shipper's possession and have come into the possession of any of those who are to forward them upon an interstate journey, intended to be such from the outset, they become a part of interstate commerce."

We especially call attention to the requirement that the goods shall have finally left the shipper's possession and have come into the possession of another. Some such phase of changed possession, during which the theft must occur, is a *sine qua non* of any movement in interstate commerce. If the goods were stolen directly from the consignor, even by the individual who was supposed to

start them on their journey, there never was even an infinitesimal progress in interstate commerce, and the jurisdictional fact is absent.

Nor is the deficiency supplied by the inclusion in the stipulation of an expression to the effect that the merchandise was in interstate commerce. This is wholly conclusory and is nothing more than an attempted legal inference from certain facts. If in the very same stipulation we find such a conclusory statement as well as a statement of fact which contravenes it, the conclusion must yield to the fact. Moreover, if the conclusion and the fact are to be accorded equal weight, the least that can be said for petitioners' position is that the stipulation is self-contradictory and to the extent to which it exhibits a jurisdictional impediment, it must be regarded as insufficient to furnish a foundation for criminal prosecution.

The statute we have quoted above represents an extension of federal jurisdiction under the interstate commerce clause of the Constitution. The rules applicable to prosecutions thereunder have been strictly applied. We are aware of no holding that a stamping of papers or other overt manifestation of an intent to move merchandise in interstate commerce can constitute a substitute for actual moving.

A borderline case is *U. S.* v. *Fox*, 126 F. 2d 237, where the goods were regarded as having begun their journey in interstate commerce, but there the evidence showed that the railroad's receiving clerk had already signed the bill of lading for the truckman. As against this type of holding, there is the leading case of *Coe* v. *Errol*, 116 U. S. 517, 29 L. Ed. 715: while this related to a different statute, this Court held that goods collected at a depot for export could not be regarded as moving in interstate commerce until actually committed to a common carrier for exportation

out of the state. *Cf. Wolk* v. *U. S.*, 94 F. 2d 310, and cases cited. An enlightening parallel is afforded by the Eighth Circuit decision in *O'Kelley* v. *U. S.*, 116 F. 2d 966, where it was decided that the theft of goods from a freight car (which had moved in interstate commerce) after the consignee had accepted the car did not constitute a federal offense, since the goods had already lost their character as articles of interstate commerce.

The rigidity of the requirement is also illustrated by the recent holding in *U. S.* v. *Kaplan*, 156 F. 2d 192 (advance sheets of October 14th, 1946). While the Government there confessed error, the Court was careful to state:

> "The judge should have told the jury that appellant could be found guilty only if it found from the evidence that the goods were still moving in interstate commerce when the theft occurred."

We also direct attention to Section 411 of the same statute, reading as follows:

> "To establish the interstate or foreign commerce character of any shipment in any prosecution under this Act—Sec. 409 of this title—the waybill of such shipment shall be prima facie evidence of the place from which and to which such shipment was made."

This very law evidences a Congressional intent to make the waybill merely presumptive evidence, subject to rebuttal by affirmative proof of a contrary character. In these circumstances, were petitioners able to demonstrate the coexistence of the intent to steal with the acquisition of possession by the truckman, this would suffice to destroy the statutory presumption.

Since the interstate character of the transaction is a *sine qua non* of the exercise of power by any federal court to entertain a prosecution predicated thereon, we do not believe a party can be concluded by a stipulation. "The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer." Mr. Justice Frankfurter in *Nierbo Co.* v. *Bethlehem Shipbuilding Corpn.*, 308 U. S. 165, 84 L. Ed. 167. Consent can never confer jurisdiction in opposition to a statutory requirement. *McClaughry* v. *Deming*, 186 U. S. 48, 48 L. Ed. 870. So, where it was stipulated between the parties (although the fact was otherwise) that the amount involved brought the case within the statutory minimum for federal jurisdiction, it was held that the stipulation could not avail the respondents, "as it is settled law that consent cannot give jurisdiction." *Merrill* v. *Petty*, 16 Wall. 338, 21 L. Ed. 499. Similarly, where the District Court lacks the statutory power to entertain a particular motion, the consent of the United States Attorney himself is unavailing. *U. S.* v. *Mayer*, 235 U. S. 55, 59 L. Ed. 129.

Wholly apart from the jurisdiction not conferrable by stipulation, there is also to be considered whether under all the circumstances petitioners were not entitled to be relieved of a commitment so seriously curtailing their rights. In the language of this Court in *Carnegie Steel Co.* v. *Cambria Iron Co.*, 185 U. S. 403, 46 L. Ed. 968:

> "The stipulation * * * ought not to be used as a pitfall, and where the facts subsequently developed show, with respect to a particular matter, that it was inadvertently signed, we think that upon giving notice in sufficient time to prevent prejudice to the opposite party, counsel may repudiate any fact inadvertently incorporated therein. This practice has been frequently upheld in this and other courts."

Certainly the inconvenience to the Government of a retrial does not outweigh the liberty and good name of three innocent defendants.

The absence of proof on the cardinal point of whether the goods were in fact of interstate character so as to bring them within the confines of the statute, leads us naturally to the efforts of petitioners to adduce evidence on this head and the refusal of the District Court to accord them this right and opportunity in conjunction with their application for a new trial.

4

The showing of newly discovered and additional evidence was such as to entitle petitioners to a new trial, and the denial of their motion by the District Court was an abuse of discretion.

It is well established that where the District Court abuses or improperly fails to exercise its discretion on a motion for a new trial based on newly discovered evidence and other grounds, the ruling is reviewable on appeal. *Royal Ins. Co.* v. *Eastham,* 71 F. 2d 385. The pertinent rules are far from inflexible; their application depends upon the peculiar circumstances of the case "and to the fundamental limitation that they should not be used for the purpose of injustice, or to deny to an accused an opportunity to establish his innocence of the crime charged on a proper showing of newly discovered evidence" (23 C. J. S. 1227). In conformity with these principles and in aid of substantial justice, such motions have recently been granted in *People* v. *Sagal,* 29 N. Y. S. 2d 741; *People* v. *Buchanan,* 259 App. Div. 758, 18 N. Y. S. 2d 42; and *People* v. *Kaslov,* 237 App. Div. 594, 262 N. Y. S. 300.

The evidence offered by petitioners in support of their motion, which was seasonably made between verdict and sentence, consisted of the following: (1) The affidavit and testimony of one David Golkow, a Philadelphian, who, unknown to any of petitioners at the time of the trial, was present at the place of business of petitioners Hefler and George Levy on June 8th, 1945, when the transaction of all the defendants with Kaufman was consummated; Golkow deposed and testified that the sale was an entirely innocent one and that there had been no disclosure or intimation by Kaufman of the stolen character of the goods. Golkow's affidavit was implemented by the affidavits of petitioners themselves showing how by the merest chance, since the trial, they learned of Golkow's presence, and completely accounting for and excusing their failure to produce him on the trial. (2) Documentary and affidavit proof to the effect that the goods involved in the case were purchased by defendants at a reasonable price, not inordinately low in view of what was paid for comparable merchandise, together with proof in the form of a number of affidavits from widely scattered business men that after the purchase by petitioners the merchandise was widely and openly exhibited in New York City for sale in a manner clearly negativing any transaction in stolen merchandise. (3) An offer to prove that the truckman Sullivan intended to steal the merchandise at the moment he obtained possession thereof, so that it never actually moved into interstate commerce, as a result of which the indictment and any judgment predicated on it would be jurisdictionally defective. (The third element will be separately treated below.)

We shall not unduly lengthen this brief by minute recapitulation of the contents of the several affidavits and the testimony on the hearing. The affidavits themselves con-

cisely set forth the evidence, and nothing adduced on the hearing detracted from them. Mr. Golkow was subjected to a thorough cross-examination, which was permitted to go far afield and beyond all reasonable limits—and this was in addition to a sudden midnight grilling at his home by F. B. I. agents, running into the early hours of the morning. We submit that he emerged from all of this absolutely unimpeached. In fact, his ability to identify Kaufman, whom he had previously seen on this one occasion, was dramatically demonstrated by a chance encounter on the steps of the Federal Court House on the day of the hearing, as was shown by the testimony of Mr. John J. Dowling, petitioners' original counsel (452-453).

The case comes well within the general rules governing applications for new trials based on newly discovered evidence. As the Court is doubtless cognizant, a defendant, to merit such relief, must usually show that the evidence has been discovered since the trial (*U. S.* v. *Smith,* F. Cas. No. 16,341); that the failure to produce it at the trial was not owing to want of diligence (*Green, Moore & Co.* v. *U. S.,* 19 F. 2d 130; *Silva* v. *U. S.,* 38 F. 2d 465); that it is material (*U. S.* v. *Smith, supra*); that it is not merely cumulative (*Gichanov* v. *U. S.,* 281 F. 125; *Baird* v. *U. S.,* 279 F. 509). It is further declared that the evidence must be of a character likely to change or influence the result (*U. S.* v. *Blumberg,* 273 F. 617). As illustrative of evidence heretofore deemed sufficient, we cite *U. S.* v. *Senft,* 274 F. 269, where it was held that testimony tending to discredit an important witness, such as his conviction of a crime, would be deemed sufficient to meet the requirement.

This being the law, since the conviction rests on the sole foundation of the testimony of Kaufman, the testi-

mony of a disinterested person (not hitherto known to be available or in existence) which completely demolishes Kaufman's testimony is patently adequate. It must be remembered that Mr. Golkow was the only individual other than Kaufman and petitioners themselves in a position to testify concerning the meeting which was the heart and gravamen of the alleged offense. It was a fortuitous circumstance that recently made petitioners aware of Mr. Golkow's presence on the occasion in question. Clearly ordinary diligence would not have revealed that he was a witness. In a transaction openly conducted, with no thought of privacy, in a place where innumerable individuals might have visited without being especially noticed, there was nothing to suggest that Mr. Golkow was there at the time. Not that we need to invoke it, but it must be remembered that the rule of diligence is not applied so strictly in criminal as in civil causes (*U. S.* v. *Briggs*, 19 D. C. 585).

It is surely not reasonable to view the testimony of the only disinterested witness of the major transaction of the case (indeed, the only one relating to petitioners Hefler and George Levy) as being cumulative; yet, were it so regarded—which we strongly oppose—that in itself would not obviate it as a permissible basis for a new trial, so long as it might be sufficient to change the result (*Larrison* v. *U. S.*, 24 F. 2d 82).

The prime consideration on every such motion is whether substantial justice has been done (*Turner* v. *U. S.*, 14 F. 2d 360). Since this is so, it is quite proper for the Court to consider the other substantial evidence presented by petitioners (both to show that the $4 price was altogether fair and to establish the wide open manner in which they offered the merchandise for sale), re-

gardless of whether it technically comes within the description of newly discovered evidence. It has been well said with respect to such a motion (in *People* v. *Benham*, 30 Misc. 466, 63 N. Y. S. 923) that "if substantial justice, 'which is the ultimate end of all law,' can be best attained by a new trial, it will not be denied because some of the evidence was known at the time of the trial." The Ninth Circuit also recently held, in *Paddy* v. *U. S.*, 143 F. 2d 847, that consideration of a motion for new trial on ground of newly discovered evidence would not be refused on the ground that it was not a motion solely on the ground of new evidence but included other grounds.

The learned District Court promptly rejected all applications by the petitioners, summarily denying them any relief (Supp. 118). The Court declined to look at a memorandum tendered by petitioners' counsel (106) and declared (Supp. 134), "I say also that I doubt very much from what I have heard in connection with this motion that it has helped any of these defendants in connection with the sentence." There was therefore a plain intimation that petitioners may well have been penalized for exercising in good faith their undoubted legal rights. Nor would the District Court grant petitioners any time at all following sentence for the adjustment of their affairs (Supp. 136-140). We mention these matters in conjunction with the proceedings as being indicative of an abuse of discretion. Of course, one cannot "win the game by sweeping all the chessmen off the table," to quote the felicitous metaphor of Learned Hand, J. (52 Harv. L. Rev. 361). The application of petitioners, grounded as it is in their innocence, merited a consideration which we feel it has not yet received.

5

The refusal of the District Court to issue a writ of habeas corpus ad testificandum to establish a jurisdictional defect in aid of petitioners' motion for a new trial was reversible error.

While applying for a new trial, and several days prior to the hearing of the motion, petitioners presented to the District Judge a petition for and a writ of habeas corpus ad testificandum to compel the attendance of Sullivan as a witness, he being confined as a prisoner in the United States Penitentiary at Lewisburg. The petition described the testimony of Sullivan as material and necessary on the jurisdictional issue of whether there actually was any theft in interstate commerce, an issue concerning which no testimony had been given for the reason that the point was covered—erroneously and improvidently, as it later appeared—by stipulation. In order that there be no other official obstacle to Sullivan's attendance, petitioners obtained from the Federal Bureau of Prisons telegraphic authorization to the Warden at Lewisburg, Pa., and to the Marshal of the Southern District of New York to honor the writ when obtained. The question of interstate theft was jurisdictional and was obviously important. Petitioners were not seeking to gain time; their counsel would have been content with the Government's concession that Sullivan's "intent to steal the merchandise was formulated before the goods was received" (469). The Government would neither assent to such a concession nor agree to the production of Sullivan, explicitly regis-

tering its opposition (469). Thereupon the Court said (469):

> "I will deny the application. I will deny it on the grounds of jurisdiction. And I think from what I have already said that I will also deny the application at this time to take the testimony of Sullivan or to bring him up."

This constituted the District Court's ruling on the application for a writ of habeas corpus ad testificandum.

In short, the learned District Court was constrained to deny the relief sought, not in the exercise of discretion but for the declared jurisdictional reason that it did not conceive itself to possess the power. This was obvious error. The Sixth Amendment to the Constitution of the United States guarantees to the accused in all criminal prosecutions "compulsory process for obtaining witnesses in his favor." Chapter 14 of Title 28 of the United States Code, or the Habeas Corpus Act, renders the constitutional safeguard effective in so far as prisoner witnesses are concerned. Under Section 455, in every case where the petition shows a party to be entitled thereto, "the court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus." Accordingly, for the Court to deny that it had jurisdiction in the premises was not a correct statement of the law.

The denial of the process could not be justified on any ground that the Government would be subjected to expense thereby. Petitioners were and are ready to defray all expenses incurred, although the Court in its discretion might have required the Government to bear the expense —particularly in a situation where the witness involved was necessary for the establishment of the prosecution's

prima facie case. *Neufield* v. *U. S.*, 118 F. 2d 375. Surely where petitioners offered, as herein, to pay the expenses, compulsory process should have issued on their application. *Casebeer* v. *Hudspeth*, 121 F. 2d 914.

In view of the importance of the inquiry and the District Court's denial of the petition on supposedly jurisdictional grounds rather than in the exercise of discretion—even if we assume that any discretion was appropriate—, as the record stands we are confronted with a situation where the Court absolutely declined to exercise any discretion. A refusal by the Court to exercise its discretion deprived petitioners of a right to which they were entitled and necessitates a reversal of the judgment and order, and a remand with appropriate directions. *Harrison* v. *U. S.*, 7 F. 2d 259. The failure of the District Court in an appropriate case to exercise the discretion vested in it is invariably deemed reversible error. *Mattox* v. *U. S.*, 146 U. S. 140, 36 L. Ed. 917.

6

The reception, over objection, of evidence tending, without any justification whatsoever, to suggest the commission of other crimes by petitioners, was clear, prejudicial and reversible error.

Detective Rosenfeld took from the premises of petitioners Hefler and George Levy some of the jackets involved in the case (110-111). He then testified as follows (111):

> "Q. Now, you seized certain property in addition to the jackets; is that correct, on the premises? A. Over here?

"Q. I mean, at the time, in addition to the 87 jackets, did you seize and confiscate and take to police headquarters other materials? A. Yes, I did.

"Q. Why did you do that? A. Because—

"Mr. Dowling: I object to it as immaterial, your Honor.

"The Court: I will let it go in.

"A. (Continuing) Because I felt that those may be the proceeds of other larcenies."

The error presented by this line of testimony is one that it is scarcely necessary to argue at this date. Since the holding in the leading case of *People* v. *Molineux,* it has been "one of the distinguishing features of our common law system of jurisprudence that, as a general rule, a person who is on trial charged with a particular crime may not be shown to be guilty thereof by evidence showing that he has committed other crimes." Werner, J., in *People* v. *Grutz,* 212 N. Y. 72, 76. A concise expression of the rule is contained in the opinion of Untermyer, J., in *People* v. *Horie,* 258 App. Div. 246, 16 N. Y. S. 2d 235:

"We think the error was so prejudicial as to require the granting of a new trial. The rule 'which excludes evidence of other crimes unless the evidence is relevant to the issues on trial, should be strictly enforced.' People v. Richardson, 222 N. Y. 103. The improper admission of such evidence constitutes a very serious infraction of the rights of a defendant (People v. Jones, 191 N. Y. 291), whether the triers of the facts be a jury or a court. 'The natural and inevitable tendency of the tribunal * * * whether judge or jury * * * is to give

> excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.' 1 Wigmore on Evidence, 2d ed., Section 194."

Of course, the rule is the same in the federal courts. As was stated in *Simpkins* v. *U. S.*, 78 F. 2d 594:

> "Proof of offenses other than those charged in the indictment is generally inadmissible and constitutes prejudicial error even though the separate offenses may be of a similar nature."

To like effect is *Whealton* v. *U. S.*, 113 F. 2d 710. The rationale of the familiar rule was well expressed in *Boyd* v. *U. S.*, 142 U. S. 450, 35 L. Ed. 1077, where Mr. Justice Harlan wrote regarding evidence of other offenses:

> "Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

If such be the rule with respect to defendants who actually are recidivists, or steeped in other crimes, what are we to say about defendants who have never been previously involved, who have not the remotest connection with the other offenses insidiously imputed to them? It is easy to see that the Government realized the weakness of its case and considered it necessary to resort to such grave improprieties in the desire to compel a conviction.

As Mr. Justice Frankfurter recently stated, in *Bollenbach* v. *U. S.* (decided Jan. 28, 1946), 90 L. Ed. 326:

> "It may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

We submit that if there were nothing in the present appeal but the foregoing pernicious invasion of petitioners' rights, this would be more than adequate to necessitate a reversal.

7

On the issue of whether petitioners purchased the merchandise at a reasonable price, it was reversible error to admit, despite objections (a) evidence of a high retail price of the goods involved; (b) testimony of a bookkeeper as to selling prices; and (c) evidence of the OPA ceiling prices of a particular firm.

In the testimony of the witness Kaufman, we desire to direct the attention of the Court to something occurring on his redirect examination which constituted a serious infraction of the rights of petitioners and which we desire to

assign as error: It was error to permit the prosecution to show, both by evidence and by innuendo, that the articles of merchandise involved had a retail selling price of $9 or more. Inasmuch as petitioners purchased the jackets at $4 each—a price not at all out of line, as they showed, for comparable merchandise in that quantity—, the Government sought to show that the price was so low as to place petitioners upon notice that something was wrong. We submit that the prosecutor in his zeal overstepped permissible bounds in the following fashion (60-61):

"Q. If I tell you that in June 1945 these 1400 garments had an average retail sales price to the public of $9.95—

"Mr. Dowling: I object to that as testimony. Your Honor, there has been no foundation for that statement by the District Attorney. It is highly prejudicial and should be stricken out.

"The Court: What is the question?

(Record read.)

"Mr. Dowling: Your Honor, I object to that and I move to strike it out. I furthermore move for the withdrawal of a juror. It is absolutely prejudicial.

"The Court: I will deny the motion for the withdrawal of a juror and I will sustain the objection to the question on the ground it is improper in form.

"Mr. Dowling: I ask your Honor to instruct the jury that there is absolutely no foundation in the statement and that they should regard the statement as not having been asked.

"Mr. McAuley: There is evidence in this case—

"The Court: The witness has testified as to what the value was and as to what the price was."

Far from excluding the suggestions from the consideration of the jury, the Court below thereupon permitted Kaufman to testify that the retail price was $9 to $10 (61-62). Neither Kaufman nor any of the petitioners was a retailer. What the goods did or could be sold for at retail was wholly immaterial. No retail transaction was involved in the case. Moreover, the only effect of such testimony was to mislead the jury through imparting to them the impression that defendants purchased a $10 article for $4, ergo must have known it was stolen. In a case where the proof of guilt was so utterly nebulous, no one can categorically say that such procedure did not have a bearing upon the verdict.

Secondly, the trial Court denied a motion of petitioners to strike the testimony of Ceal S. Weiss, a bookkeeper, employed by a firm which had purchased the jackets from Hefler & Levy, to the effect that that was the type of jacket for which they were paying $6.75 (151). Not only was she clearly not qualified as an expert, but it is established that evidence of a private purchase or sale is not competent evidence of value. *Groves* v. *Warren,* 233 N. Y. 160; *Latimer* v. *Burrows,* 163 N. Y. 7.

Even more objectionable and prejudicial was the testimony of Lerner, a partner of the American Sheep Lined Company to the effect that his firm's authorized ceiling price for this merchandise, as fixed by the O. P. A. was $5.50 (87-95). It must be remembered that the figure was fixed "for this manufacturer to sell at wholesale" and it had "the approval of the O. P. A.," to quote the language used by the Assistant U. S. Attorney himself (90). Now the Court can take judicial notice that different manufac-

turers had different ceilings, dependent upon a variety of circumstances; naturally, petitioners could not be expected to know upon what this particular ceiling was based; the evidence was in no way competent, and was received over objection and running exception (87-95).

The jury was thus permitted to take into consideration these two important, withal extraneous, factors on the significant issue of whether petitioners paid a fair price for the merchandse. In a case of this kind, where we are bound to reiterate that petitioners were innocent, again the objectionable evidence could easily have produced the adverse verdict.

CONCLUSION

We end this brief in the same manner as we began it, namely, with a reiteration of petitioners' complete innocence. We seek their vindication, and every argument advanced herein is presented against the invariable background of that earnest contention.

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of certiorari should be granted.

Dated: New York, N. Y., March 13, 1947.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioners.

APPENDIX

Opinion Below

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 138—October Term, 1946.

(Argued December 12, 1946 Decided February 13, 1947.)

Docket No. 20478

UNITED STATES OF AMERICA,

Appellee,

—v.—

MORRIS HEFLER, GEORGE LEVY and AL LEVY,

Defendants-Appellants.

Before:

SWAN, AUGUSTUS N. HAND and CLARK,

Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York.

From a judgment of conviction and sentence for the crime of receiving stolen goods in violation of 18 USC §409, the defendants appeal. Affirmed.

FRED D. KAPLAN, *Attorney for appellants;* I. Maurice Wormser and Jacob W. Friedman, of counsel.

JOHN F. X. MCGOHEY, *United States Attorney, for appellee;* Bruno Schachner, Keith Brown, Harold J. McAuley and William M. Regan, Assistant U. S. Attorneys, of counsel.

SWAN, *Circuit Judge*:

Each of these three appellants was convicted,[1] after trial, of receiving leather jackets stolen in interstate commerce, knowing the same to have been stolen, in violation of 18 USC §409. The appeal challenges (1) the sufficiency of the evidence to prove the appellants' knowledge of the theft, (2) the proof that the goods were stolen in interstate commerce, (3) the admission of certain evidence, (4) the denial of a motion for a new trial, and (5) the refusal to issue a writ of *habeas corpus ad testificandum* to establish an alleged jurisdictional defect in aid of the motion for a new trial. We shall consider these contentions seriatim.

1. With respect to the claim that a verdict of acquittal should have been directed because of the insufficiency of the evidence to establish the appellants' knowledge that the goods were stolen, little need be said. It was stipulated that 28 cartons, containing 1400 leather jackets, while in process of shipment in interstate commerce from New York

1 Hefler and George Levy were convicted under one indictment and Al Levy under a separate indictment; the two indictments were consolidated for trial.

City to points in other states were stolen on June 7, 1945 by John Sullivan, a truck driver for Scott Bros., contract drivers for the Pennsylvania Railroad, from the consignor, American Sheep Lined Coat Company. Sullivan delivered the cartons in his truck to Fisher, who purchased them with knowledge that they were stolen; and Fisher in turn sold them to Kaufman who also had knowledge. The appellants bought them from Kaufman. He had pleaded guilty to a separate indictment charging him with the same crime as the appellants, and was a witness against them. If his testimony was believed there was no lack of proof as to the appellants' guilty knowledge. He testified repeatedly that he told them that the transaction was "illegitimate" and that the goods were "stolen." The appellants argue that his testimony was unworthy of belief; but plainly that was an issue for the jury, not the trial judge, to determine. Moreover certain conduct of the appellants tended to corroborate his story. They accepted from Kaufman, whose name they knew, invoices made out in the fictitious name of Bronson, and drew their checks in payment for the jackets to the fictitious Bronson; and before they received the goods the cartons had been mutilated so as to obliterate the names of consignor and consignee, which might well cause a purchaser to be suspicious of the source of the goods. The trial court was clearly right in refusing to direct a verdict for lack of proof of guilty knowledge.

2. In arguing that there was insufficiency of proof that the goods were stolen while moving in interstate commerce, the appellants urge (a) that the prosecution failed to prove that the theft was from a truck or any of the other places specified in the statute, and (b) that their stipulation, expressly conceding that the goods were stolen in interstate

commerce, was vitiated because when asked from whom they were stolen counsel replied "from the consignor." These are extraordinary contentions to present for the first time on appeal. Each is plainly an after-thought, never suggested at the trial; neither has the slightest merit. Counsel for the defendants informed the court: "Your Honor, we agreed that I would stipulate, to save time, that these goods were stolen while in interstate commerce by Sullivan, [and] sold to Fisher * * *" In formulating the stipulation nothing was said to intimate any departure from this agreement; and without objection by the defendants the court charged the jury that the parties had stipulated that the goods "were stolen while they were a part of or constituted an interstate shipment of freight or express, so that that particular issue is in no way involved in the case to be decided by the jury."

(a) If, as the stipulation conceded, the goods were stolen while in interstate commerce, the theft necessarily occurred after they were loaded on the truck driven by Sullivan, for only then did they get into the stream of commerce. *United States* v. *Fox,* 126 F. 2d 237 (C. C. A. 2); *Sharp* v. *United States,* 280 F. 86 (C. C. A. 5); *Wolk* v. *United States,* 94 F. 2d 310 (C. C. A. 8). Moreover, confirmation that they were stolen while on the truck is supplied by Fisher's testimony that the cartons were transferred to his premises from Sullivan's truck.

(b) Equally unsound is the argument that the stipulation establishes that the cartons were never delivered to the carrier and consequently never moved in interstate commerce because of the additional concession that they were stolen "from the consignor." If counsel intended his reply

to the question "Stolen from whom?" to have the meaning now asserted for it, he was deliberately tricking the prosecutor and the court into believing that a necessary element of the crime had been conceded when it had not. We should hesitate to ascribe any such intention to counsel and fortunately we are not compelled to do so, for the reasonable meaning of his response to the district attorney's question does not contradict the prior concession that the goods were stolen while in interstate commerce. The question was equivalent to asking whose goods were stolen, and the answer meant that they were the consignor's goods, not that the consignor had possession of them at the moment of the theft. They could properly be described as the consignor's goods even though the general property had passed to the consignees and only a security title been reserved by the consignor. Possession of the goods was proved to be in the trucking company by the concession that they were in interstate commerce when stolen. The truck-driver had only custody of them for his employer; 2 Bishop, Criminal Law, 9th ed. §858; *Commonwealth* v. *Brown*, 4 Mass. 580. The exact time at which the theft occurred was the moment when Sullivan with the requisite guilty intent turned his truck off the normal route he would have followed to his legitimate destination. Whether he had previously formed the intent to steal or formed it at that moment is immaterial. See *Weisberg* v. *United States*, 258 F. 284 (C. A. D. C.).

3. We find no merit in the appellants' objections to the admission of evidence. The claim that evidence of other crimes was admitted is not borne out by the record. Any harm which might otherwise have resulted from policeman Rosenfeld's testimony that he seized certain merchan-

dise because he suspected that it might be "the proceeds of other larcenies," was cured by his testimony on cross-examination that investigation disclosed that the seized merchandise had been lawfully acquired by the defendants and was returned to them. There was no error in admitting the evidence regarding prices. Weiss was properly qualified before she testified on this subject. Kaufman's testimony concerning prices was elicited on redirect examination after defense counsel had opened this line of testimony on cross-examination. Neither do we see error in the admission of Lerner's testimony.

4. Concededly the granting or denial of a motion for a new trial is a matter within the discretion of the trial court. We do not think Judge Coxe abused his discretion in denying the motion. He accorded an extensive hearing at which the newly discovered witness, Golkow, was examined at great length, and he came to the conclusion that Golkow's testimony was not of a character likely to change the result of the trial. With this conclusion we agree.

5. The defendants applied for a writ of habeas corpus to bring Sullivan from the Lewisburg Penitentiary in order that he might testify in aid of their motion for a new trial. The testimony they hoped to elicit was that he had formed the intent to steal the cartons of leather jackets before he received them from the consignor. Their theory is that if such intent did precede the loading of Sullivan's truck, then the goods never got into interstate commerce. The fallacy of this theory we have already demonstrated in the discussion of Point 2, *supra*.

Finding no error in the record we affirm the judgment.